



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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January 13, 2010

Deputy Under Secretary of Defense Dorothy Robyn
U.S. Department of Defense
3000 Defense Pentagon
Washington, DC 20301-3000

Dear Deputy Under Secretary Robyn:

The Nez Perce Tribe would like to thank you for the opportunity to provide comments and input on the Department of Defense's (DoD) efforts to formulate an action plan to comply with President Obama's memorandum on consultation and to formulate a tribal consultation plan. The Nez Perce Tribe appreciates the efforts of DoD to implement a responsive consultation policy with Indian tribes. Many decisions and actions by DoD and its regional offices have an impact on the sovereign rights of tribes and it is important that these decisions are made within a framework of consultation with the affected tribes. This will help insure that the federal government upholds and honors its trust responsibilities to all tribes.

The Nez Perce Tribe has participated in several consultations with other federal agencies on this issue including one held by the Department of Interior in Portland, Oregon on December 9, 2009. The Nez Perce Tribe is providing these written comments so that they may be considered by DoD prior to it formulating a final action plan. During the other consultations, the Tribe has heard many different ideas that it believes would be useful in helping an agency with compliance with the consultation requirements of Executive Order 13175. Those ideas include:

1. Having a dedicated liaison for tribes;
2. Having a dedicated resource page for tribes on a website;
3. Formulating a training program for employees regarding tribes and sovereignty of tribal governments and the unique government to government relationship between tribes and the federal government; and
4. Having regularly scheduled or annual consultations with tribes.

The Nez Perce Tribe believes these items have some merit and if used would help DoD meet the consultation requirements expressed in Executive Order 13175. Those items as well as the general view of the Nez Perce Tribe on consultation are expressed below.

The importance of consultation cannot be overstated and can and should occur in different ways. The Environmental Protection Agency has formulated a good definition of what constitutes consultation in a draft plan put together by its Region 10. The first step in consultation is need for proper notice. The amount of time needed to give notice to tribes of DoD's intent for consultation will depend on the number of tribes that are being affected by a federal action. If a federal action affects all or a majority of Indian Country than it would be necessary to provide as much notice as possible for travel arrangements. If the federal action will affect a smaller area, the notice can be shorter as long as the consultation comes prior to any decision making. The elected officials for the Tribes should be involved with the consultation. However, the Nez Perce Tribe has found it very beneficial to have tribal staff work with corresponding federal employees to further define the issues that need to be addressed under a federal action. In addition, the most effective consultation efforts in which the Nez Perce Tribe have been involved are when the tribal elected officials are able to meet one on one with the appropriate federal staff and have a two-way dialogue.

An important element of this success can also be attributed to the federal agencies having an established tribal liaison position. The importance of the role that such a person can play in helping both parties navigate through the bureaucratic maze that makes up the federal government as well as an understanding of the tribal government process cannot be overstated. The Tribe strongly endorses the idea that DoD create or have a dedicated liaison position. In addition if it does not already exist, DoD should consider having such a position out in the field to assist in coordinating the consultation process..

The Tribe also strongly supports any efforts by DoD to formulate and implement a training program for employees that will help educate and inform employees about tribal governments, treaty rights and the federal trust responsibility of the United States to tribes. Such education efforts will be beneficial and help strengthen the working relationship between tribes and DoD. It is important to note that regional employees should also take the time to learn specific information about the tribes that are in a particular region. The nature and structure of a tribal government can vary greatly from tribe to tribe. It is also important for an employee to be aware of some of the cultural and history (both political and chronological history) of a tribe.

In addition, it is important that DoD properly implement consultation anytime any federal action will or could affect a single tribe or Indian Country in general. Given the vast nature of treaty reserved rights and the increasing work and responsibilities that have been assumed by tribal governments, a presumption that a federal action will affect a tribe is the most prudent measure an agency can take. Such a presumption will force a person making a decision to take the analytical steps necessary to build a case that either supports or rebuts that presumption. In doing this analysis it is important that more than just federal statutes are considered. A working knowledge of tribal treaty rights, the Indian Trust Doctrine and Public Trust Doctrine and case law interpreting those rights is imperative.

If the presumption is supported, it is then prudent to begin to directly involve the tribe or tribes affected by the action at the earliest stage possible and prior to any decisions being made. Involvement at this stage will allow most tribes to begin to utilize its staff to further assess and evaluate what responses or actions are required from a tribal perspective. It is at this stage that

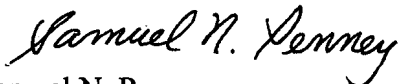
most obstacles or barriers can be identified that would likely affect the proposed federal action. It also begins the collaborative process at the formation stage of the action before any decisions.

In contacting tribes for large consultations on issues or in requesting comments, some preliminary attention should be made to the manner in which the tribes are contacted about consultation. It is important that any information that is being transmitted to tribes arrive to the correct persons in a timely manner. Maintaining a current database of tribal leaders and the primary contact information and procedures for each tribal government is important so that information is not lost in the massive amounts of information and mail received by tribes each day.

Finally, it would be helpful to develop with tribes alternative methods of hosting consultation meetings to alleviate some of the travel burden. Some resources should be provided to help tribes shoulder the travel burden as well as aide in establishing or promoting the technology of video, computer or audio conferencing.

Hopefully these comments will prove useful to DoD while it formulates its action plan regarding consultation. Thank you again for providing this opportunity to provide comments.

Sincerely,

A handwritten signature in cursive script that reads "Samuel N. Penney".

Samuel N. Penney
Chairman